

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 310 of 1981

with
Cross Objection

For Approval and Signature:

HON'BLE MR.JUSTICE A.M.KAPADIA

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

STATE OF GUJARAT

Versus

AMRITLAL KALIDAS PATEL

Appearance:

1. First Appeal No. 310 of 1981
MR KL PANDYA AGP for Appellant
MS MAYA N BHAVNANI for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 01/12/2004

ORAL JUDGEMENT

1. This appeal filed under Section 96 of the Code of
Civil Procedure ('the Code' for short) is directed

against the judgment and decree dated 30.6.1980 passed in Special Civil Suit No.79 of 1975 by the learned 3rd Joint Civil Judge (S.D.), Surat by which the suit filed by the respondent against the appellant for recovery of Rs.63,000/- as damages came to be partly allowed and thereby decree to the tune of Rs.53,514.87 was passed in favour of the respondent and the appellant was directed to pay the said amount together with proportionate costs.

2. The appellant herein was the defendant whereas the respondent herein was the plaintiff, therefore, the parties are hereinafter referred to as "the plaintiff" and "the defendant" in this judgment for the sake of convenience.

3. According to the case of the plaintiff, the work of flood damage repairs of Unai-Buhari Miles from No.8/4 to 9/3 was entrusted to the plaintiff vide agreement No.B/2/63 of 1969-70. The said work was required to be started with effect from 23.1.1970 and was to be completed on or before 22.9.1970. According to the case of the plaintiff, the necessity of this work was the result of flood damage during the year 1968. The work which was done in the year 1968 was washed away in the flood of 1968 and as such tenders were invited for carrying out the flood damage work in these portions. The Government had also entrusted the work of constructing protective bund on Mindoree river to another agency with a view to protect the flood damaging the road in question. This bund work was entrusted to another agency earlier than the work awarded to the plaintiff with a view to see that protective bund work will be completed before the road work was awarded and completed by the plaintiff but the agency to which the construction of protective bund work was entrusted could not complete the said work earlier than the completion of work by the plaintiff. Again in the year 1970, there was heavy flood and again the pitching work and W.B.M. work which were carried out by the plaintiff to the extent of Rs.63,000/- were washed away as the protective bund proposed to be constructed by another agency was not completed and the water rushed to the road and there was as such flood damage loss to the extent of Rs.63,000/- to the plaintiff. The plaintiff was not responsible for such flood damage work and was not responsible to carry out the said work. However, the department assured him that the work which was damaged in flood would be measured again when he completes the same and for that he would be paid. According to the plaintiff, the work of pitching and W.B.M. which were re-done after the flood damage were recorded in the measurement book and the same

was payable to the plaintiff. It was the case of the plaintiff that the work which was washed away in the flood which included the earth work also, the same was carried out by the defendant departmentally and only W.B.M. and pitching works were got carried out from the plaintiff. The washed away work of pitching and W.B.M. were recorded in the measurement book and the said work was to the tune of Rs.63,000/- It was the case of the plaintiff that the final bill of work done was prepared and paid to the plaintiff on 6.6.1972 but the work of flood damage amounting to Rs.63,000/- which was recorded in the measurement book was not included in the final bill. Since the said final bill did not contain the amount of Rs.63,000/- the said final bill was accepted by the plaintiff under protest. The plaintiff therefore served notice under Section 80 of the Code and demanded Rs.63,000/- from the defendant which the defendant did not pay and, therefore, the plaintiff was compelled to file the suit against the defendant for recovery of Rs.63,000/-.

4. The suit was contested by the defendant by filing written statement at Ex.12 wherein, inter alia, it was denied that the protective bund work was given earlier than the work was awarded to the plaintiff for the disputed road work. It was also denied that the protective work was to be completed before the completion of the road work by the plaintiff. It was the case of the defendant that under clause (20) of the contract agreement, the plaintiff was bound and liable to re-do the work which was washed away because of flood of the year 1970. It was averred that the suit of the plaintiff was time barred and since there was no cause of action accrued in favour of the plaintiff, the plaintiff was not entitled to claim Rs.63,000/- The legality of the suit notice was also challenged by the defendant. Therefore, it was prayed to dismiss the suit.

5. The learned trial Judge framed issues and recorded oral evidence on behalf of the plaintiff and the defendant and also relied upon documents produced during the course of hearing of the suit.

6. The learned trial Judge, on appreciation, evaluation and careful analysis of the evidence, came to the conclusion that the plaintiff has proved that he has completed the entire flood damage repairs as alleged; the said work was done by him was damaged by flood because of non-completion of protective work as alleged; the plaintiff had carried out the repairing work after the said damage at the instance of the officers of the

defendant State and therefore the plaintiff was entitled to recover Rs.53,514.87 Ps. and resultantly he passed the decree for Rs.53,514.87 Ps. with proportionate costs which has given rise to instant appeal at the instance of the defendant - State.

7. The plaintiff is also aggrieved by the said judgment and decree because decree for the full amount with interest at the rate of 12% from the date of the suit till the amount is paid was not passed and, therefore, filed counter claim for Rs.37,800/-

8. Mr. KL Pandya, learned AGP for the defendant has contended that the trial Court has not properly appreciated the evidence with regard to construction contract in respect of the construction work carried out by the plaintiff. The trial Court has misinterpreted clause 30 of the tender 2B Form at Ex.72. It is also contended that the trial court has wrongly relied on Ex.97, a letter dated 19.2.1971 written to Superintending Engineer, Vadodara by Mr. Kamdar, Executive Engineer as well as on Ex.112, a letter dated 19.4.1971 written by the Superintending Engineer to the Chief Engineer recommending the case of the plaintiff. It is also asserted that the suit was time barred. Much reliance is placed on clause 20 of the Contract Agreement at Ex.72. According to Mr. Pandya, the defendant was not liable to pay damages for the work which was washed away in flood. The sum and substance of the submissions advanced by Mr. Pandya, learned AGP is that the learned trial Judge has misread the evidence and misdirected himself in passing the impugned decree. Therefore, the impugned judgment and decree deserves to be set aside and thereby the suit filed by the plaintiff is required to be dismissed. He therefore urged that the appeal may be allowed and thereby the suit filed by the plaintiff may be dismissed.

9. In counter submission, Ms. Maya N. Bhavnani, learned advocate of the plaintiff, has supported the judgment and decree throughout. According her, no error is committed by the learned trial Judge. There is ample evidence on record to suggest about the relationship between the plaintiff and the defendant and at the persuasion of the officers of the defendant and as per their assurance, the plaintiff had completed the work which was washed away in flood. It is also evident that before accepting the tender it was agreed upon between the plaintiff and the defendant that the defendant would carry out the protective bund first in point of time but the defendant could not get the said work of protective bund constructed before completion of the road work by

the plaintiff which had resulted in the washing away of the work done by the plaintiff on Unai-Buhari road and the plaintiff was compelled to re-do the said work at the persuasion of the officers of the defendant. Therefore, the learned trial Judge has rightly relied upon clause 20 of the Contract Agreement at Ex.72 as well as clause 30 which empowered the Superintending Engineer to take decision and in instant case the Superintending Engineer had also recommended to the Chief Engineer to consider the case of the plaintiff for payment for the work which was re-done by the plaintiff on Unai-Buhari road which was washed away as the defendant had failed to construct protective bund well in advance. She, therefore, submitted that the learned trial Judge has rightly passed the decree. It is also submitted by her that though the trial court has passed decree in favour of the plaintiff it has not passed decree for the full amount and has also not awarded the interest as claimed by the plaintiff and, therefore, the counter claim, claiming Rs.37,800/- by way of interest is required to be allowed and the award for the said amount in favour of the plaintiff may be passed. She, therefore, urged to dismiss the appeal and to allow the counter claim.

10. This Court has considered the submissions advanced by the learned advocates appearing for the parties, perused the impugned judgment and decree and the paper book consisting of oral evidence of the plaintiff himself at Ex.71 on behalf of the plaintiff and oral evidence of Dhirajlal Nagindas Bhavsar at Ex.115 on behalf of the defendants as well as the documentary evidence consisting of original contract at Ex.72 and the letter dated 19.2.1971 at Ex.97 written to the Superintending Engineer by Mr. Kamdar, Executive Engineer and the letter dated 19.4.1971 at Ex.112 written by the Superintending Engineer to the Chief Engineer recommending the case of the plaintiff for payment.

11. There is no dispute that the plaintiff was given work contract for construction of Unai-Buhari road from 8/4 to 9/3 miles. The said work was to be started from 23.1.1970 and was to be completed on or before 22.9.1970. There is also no dispute that the said work was washed away in the flood of 1970 and therefore the plaintiff was compelled to re-do the said work at the persuasion of the officers of the defendant. Amrutlal Kalidas Patel, the plaintiff himself has at Ex.71 inter alia testified that he had re-done this work on the assurance given by the officers of the defendant Department and that he will be given the amount for the said work. The plaintiff was given his final bill for the pitching and W.B.M. work

which he had re-done in place of the road which was washed away in flood. Therefore, the dispute centres around about the work which was washed away in the flood of 1970. Therefore, the question that requires to be considered is as to whether the construction work of the protective bund was required to be completed prior to construction of Unai-Buhari road for which the contract was given to the plaintiff. In this connection, there is ample evidence to show that it was decided to build protective bund to prevent flood but ultimately the Government abandoned the work of constructing protective bund due to protest from the people of village Buhari. Therefore, the protective bund work was not constructed which had resulted into the washing away of the work done by the plaintiff on Unai-Buhari road.

12. It may be noted that statement made by the plaintiff at Ex.71 to the effect that at the instance of Mr.Kamdar, Executive Engineer, he had re-done the work which was washed away in the flood on 6.9.1970 has gone unchallenged as on behalf of the defendants Mr. Kamdar has not been examined to refute the aforesaid evidence.

13. On behalf of the defendants, Dhirajlal Nagindas Bhavsar was examined at Ex.115. He, inter alia, has deposed that on 6.9.1970 there was heavy abnormal flood in river Purna. According to him, if this was normal flood, the prepared road would not have been washed away in flood. That the defendants fixed the road level keeping in view normal flood. He also pointed out that one Hashmukhlal & Co., was given the work of constructing a protective bund. The said bund was to be built to prevent damage being caused to the road on account of flood. It was the belief of his department that there will be no damage if protective bund was built but no technical opinion was taken by the defendants. In view of the aforesaid oral evidence on behalf of the defendants, there is no manner of doubt that it was decided to construct protective bund on river Purna to prevent flood and therefore M/s. Hashmukhlal and Patel and Co. was given the work of constructing protective bund which he did for some period and stopped because of protest from village people of Buhari and the defendants ultimately abandoned the entire scheme. The object of constructing protective bund was to stop flood water from entering the village as well as Unai Buhari road but the defendants abandoned the scheme on account of protest of the village people of Buhari. As a result of protective bund could not be built the flood water damaged Unai Buhari road Milss Nos.8/3 to 9/4 and hence the plaintiff cannot beheld responsible.

14. Mr. KL Pandya, learned AGP for the defendants, has placed strong reliance on clause 20 of the contract agreement at Ex.72, to disprove the case of the plaintiff, which reads as under:

"If the contractor or his workman, or servants shall break, deface, injure or destroy any part of a building in which they may be working, or any building, road, fence, enclosure or grass land or cultivated ground continuous to the premises on which the work or any part thereof is being executed, or if any damage shall be done to the work from any cause whatever while it is in progress or if any imperfection becomes apparent in it within three months from the grant of a certificate of completion final or otherwise by the Engineer-in-charge the contractor shall make good the same at his own expense or in default, the Engineer-in-charge may cause the same to be made good by other workmen, and deduct the expenses (of which the certificate of the Engineer-in-charge shall be final) from any sums that may then be due or may thereafter become due to the contractor, or from his security deposit or the proceeds of sale thereof or of a sufficient portion thereof."

On perusal of the aforesaid clause, according to this Court, clause (20) cannot be attracted because contractor or his workman or servant had not broken, defaced, injured or destroyed any part of the work. It is because of non-completion of protective bund that had resulted in the washing away of the Unai-Buhari road constructed by the plaintiff in the flood which was required to be re-done by the plaintiff at the persuasion of the officers of the defendant. The said Unai-Buhari road was washed away because of heavy flood waters which was an act of God for which the plaintiff cannot be saddled with the liability. It has also come in evidence that the plaintiff had re-done the work upon the assurance given to him by the officers of the defendant. In this connection, it would be profitable to refer to the letters at Ex.97 as well as Ex.112. Ex.97 is a letter dated 19.2.1971 written by Mr. Kamdar, Executive Engineer to the Superintending Engineer, Vadodara. On perusal of the said letter it is noticed that Mr. Kamdar had recommended the case of the plaintiff. So far as Ex.112 is concerned, it is a letter written by the Superintending Engineer to the Chief Engineer, R&B, Gujarat State wherein the Superintending Engineer had

stated that because of the act of God i.e., flood, the road work done by the plaintiff was washed away and therefore it was desirable to consider his case. A feeble attempt is made by Mr. KL Pandya, learned AGP to suggest that Exs.97 and 112 are merely recommendatory letters and not a decision taken by the Chief Engineer who is the final authority. It may be noted that the Executive Engineer and Superintending Engineer were the authorities who were working on the site and when they had recommended to the Chief Engineer to pay Rs.53,514.87 to the plaintiff, it can be presumed that the Superintending Engineer had considered the case of the plaintiff and upon the assurance of the officers of the defendant, the plaintiff had re-done the work.

15. Besides this, there is clause 30 which stipulates that the decision of the Superintending Engineer of the Circle for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, designs, drawing and instructions. It is true that clause 30 does not stipulate damages. However, according to this Court, when the authority of the level of Superintending Engineer recommended the Chief Engineer to consider the case of the plaintiff for payment, there is no reason for the Chief Engineer to reject the recommendation made by the Superintending Engineer and thereby to reject the claim made by the plaintiff.

16. In aforesaid view of the matter, according to this Court, the trial Court has very rightly passed the decree to the tune of Rs.53,514.87 together with proportionate costs in favour of the plaintiff which does not call for any interference of this Court in this appeal in exercise of powers under Section 96 of the Code. Therefore, the impugned decree is required to be confirmed.

17. So far as the counter claim made by the plaintiff for Rs.37,800/- is concerned, it may be noted that the plaintiff has not claimed interest in the prayer clause 10 of the plaint. Therefore, the learned trial Judge has rightly not framed any issue to this effect. Therefore, there is no question of awarding interest in favour of the plaintiff. The learned trial Judge has very rightly not passed decree with interest at the rate of 12% as claimed by the plaintiff in the counter claim. Therefore, the counter claim made by the plaintiff also deserves to be dismissed.

18. In above view of the matter, this Court is in

complete agreement with the findings arrived at by the learned trial Judge and resultant decree passed by him. According to this Court, no conclusion other than the conclusion arrived at by the learned trial Judge was possible in the instant case. Therefore, the appeal lacks merit and deserves to be dismissed. Similarly the counter claim made by the plaintiff also deserves to be dismissed as being meritless.

19. For the foregoing reasons, the appeal as well as counter claim both are dismissed with no order as to costs.

(A.M. Kapadia, J.)

(karan)